

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No. 3:15-cv-00366

M. DUGAN, KAREN DUGAN, and MARK
S. DUGAN AS TRUSTEE OF THE GDM
FAMILY TRUST,

Plaintiffs,

v.

PHILLIPS WIEGAND, JR.,
PILIANA M. SCHAMENS,
DAVID W. SCHAMENS,
INVICTUS CAPITAL GROWTH
AND INCOME FUND, LLP,
INVICTUS ASSET MANAGEMENT,
LLC, INVICTUS INCOME FUND, LLP,
INVICTUS REAL ESTATE INVESTMENT,
LLP, INVICTUS FUNDS, LLC,
TRADEDESK FINANCIAL GROUP, INC.,
TRADEDESK FINANCIAL CORP.,
TRADESTREAM ANALYTICS, LTD.,
INVICTUS CAPITAL GROWTH FUND,
LLP, INVICTUS HOLDINGS, LLP,
TRADEDESK CAPITAL, LLC,

Defendants.

**PLAINTIFF’S SURREPLY IN RESPONSE
TO DEFENDANT PHILLIPS WIEGAND,
JR.’S REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS [DOC. NO. 9]**

Plaintiffs Guy M. Dugan, Karen Dugan, and Mark S. Dugan as Trustee of the GDM Family Trust (together, “Plaintiffs”), by and through their undersigned attorney, respectfully submit the following Surreply in Response to the Reply Brief [Doc. No. 9] filed by Defendant Phillips Wiegand, Jr. (“Wiegand”) in support of his Motion to Dismiss.

SURREPLY

Wiegand’s Reply Brief presents new arguments not included in his Motion to Dismiss [Doc. No. 4] or original Memorandum of Law in Support of His Motions to Dismiss Pursuant to

Rule 12(b)(1) of the Federal Rules of Civil Procedure and the Doctrine of *Forum Non Conveniens* (“Dismissal Memorandum”) [Doc. No. 5]. Specifically, nowhere in Wiegand’s original documents does Wiegand contend that Plaintiffs’ Complaint should be dismissed because Plaintiffs did not plead their respective citizenships.

In fact, in his Dismissal Memorandum, Wiegand takes the position that Plaintiffs have pleaded their citizenship. [See Dismissal Memorandum, Doc. No. 5, p. 4 (“Plaintiffs, two purported Illinois citizens and residents, and one purported Texas Trust with a trustee that is a citizen and resident of Texas [. . . .]”); *id.* at p. 10 (“Plaintiffs M. (Guy) and Karen Dugan are alleged to be citizens and residents of Illinois.”); *id.* at p. 4 (“[. . .] Illinois citizens are present on both sides of the lawsuit[.]”)].

Only now, in his Reply Brief, does Wiegand claim that the Complaint should be dismissed because “Plaintiffs have not alleged the place of their respective citizenships and therefore have failed to invoke the jurisdiction of this Court.” [See Reply Brief, Doc. No. 9, p. 5].

Plaintiffs contend that the entirety of their Complaint makes clear – as originally stated and argued by Wiegand in his Dismissal Memorandum – that Plaintiffs’ citizenships include Illinois and Texas. To make the matter even clearer, Plaintiffs attach hereto as **Exhibit A** the Affidavit of Mark S. Dugan. This Affidavit confirms that Guy M. Dugan is a citizen and resident of the State of Illinois; that Karen Dugan is a citizen and resident of the State of Illinois; and that Mark S. Dugan as Trustee of the GDM Family Trust is a citizen and resident of the State of Texas. [See Exhibit A].

Plaintiffs have thus sufficiently pleaded their citizenship for jurisdictional purposes.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court deny the Motion to Dismiss filed by Defendant Phillips Wiegand, Jr.

Dated: November 23, 2015

Respectfully submitted,

By: /s/ Mark R. Kutny
Mark R. Kutny

HAMILTON STEPHENS
STEELE & MARTIN, PLLC
201 South College Street, Suite 2020
Charlotte, North Carolina
28244-2020
(704)344-1117
Fax (704) 344-1483
mkutny@lawhssm.com
Mark R. Kutny (NC Bar # 29306)
Attorney for Plaintiff

EXHIBIT A
(Affidavit of Mark Dugan)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No. 3:15-cv-00366

M. DUGAN, KAREN DUGAN, and MARK
S. DUGAN AS TRUSTEE OF THE GDM
FAMILY TRUST,

Plaintiffs,

v.

AFFIDAVIT OF MARK S. DUGAN

PHILLIPS WIEGAND, JR.,
PILIANA M. SCHAMENS,
DAVID W. SCHAMENS,
INVICTUS CAPITAL GROWTH
AND INCOME FUND, LLP,
INVICTUS ASSET MANAGEMENT,
LLC, INVICTUS INCOME FUND, LLP,
INVICTUS REAL ESTATE INVESTMENT,
LLP, INVICTUS FUNDS, LLC,
TRADEDESK FINANCIAL GROUP, INC.,
TRADEDESK FINANCIAL CORP.,
TRADESTREAM ANALYTICS, LTD.,
INVICTUS CAPITAL GROWTH FUND,
LLP, INVICTUS HOLDINGS, LLP,
TRADEDESK CAPITAL, LLC,

Defendants.

I, MARK S. DUGAN, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am over the age of 18 and am a citizen and resident of the State of Texas. Further, Guy M. Dugan is my brother, and Karen Dugan is my sister-in-law. I have personal knowledge that both Guy M. Dugan and Karen Dugan are citizens and residents of the State of Illinois.

Executed on the 18th day of November, 2015 in the State of Texas.


MARK S. DUGAN

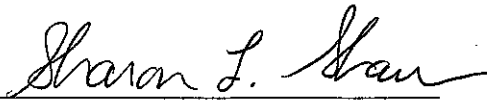
STATE OF TEXAS

§
§
§

COUNTY OF TARRANT

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, on
this the 18th day of November, 2015, to certify which witness my hand and seal of office.




Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PLAINTIFF'S SURREPLY IN RESPONSE TO DEFENDANT PHILLIPS WIEGAND, JR.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS [DOC. NO. 9]** was served upon all parties of record by electronically filing a copy of the same with the Court's ECF filing system which will send electronic notification by e-mail to:

srobinson@reslawfirm.net

William C. Robinson
Robinson Elliott and Smith
P.O. Box 36098
Charlotte NC 28236
Fax: 704-373-0290

And was additionally served via U.S. mail to:

William C. Trosch
Conrad, Trosch & Kemmy, P.A.
Suite 809, Cameron Brown Building
301 South McDowell Street
Charlotte, NC 28204
Fax: 704-331-0595

This the 23rd day of November, 2015.

By: /s/ Mark R. Kutny
Mark R. Kutny

HAMILTON STEPHENS
STEELE & MARTIN, PLLC
201 South College Street, Suite 2020
Charlotte, North Carolina
28244-2020
(704)344-1117
Fax (704) 344-1483
mkutny@lawhssm.com
Mark R. Kutny (NC Bar # 29306)
Attorney for Plaintiff